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Office-Supreme Court, U.S.
FILED
OCT 12 1959
JAMES R. BROWNING, Clerk

No. 45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

GEORGE B. PETTIE, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

EDWARD BENNETT WILLIAMS
RAYMOND W. BURGESS
AGNES A. NEILL
1000 Hill Building
Washington 6, D. C.
Counsel for Petitioner

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is reported at 147 F.Supp. 791; that of the Court of Appeals at 262 F.2d 788.

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1959 (R. 341). An order denying

rehearing was entered on February 19, 1959 (R. 347). The petition for certiorari was filed on March 20, 1959, and granted on June 15, 1959 (R. 348). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

QUESTION PRESENTED

Whether the petitioner may properly be convicted in successive prosecutions of both conspiracy and the substantive offense which is an object of the conspiracy when the substantive offense requires the same concert of action and the same actors as did the charge of conspiracy.

STATUTES INVOLVED

Title 18, United States Code:

"§ 371. Conspiracy to commit offense or to defraud United States.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

"§ 1001. Statements or entries generally.

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or documen

knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

"§ 1621. Perjury generally.

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

* * * * *

"§ 1622. Subornation of perjury.

"Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both."

STATEMENT

Petitioner is an attorney of long standing at the Maryland bar. He was born in Greece, came to this country at an early age, worked his way through Brooklyn Law School, was admitted to the Maryland bar in 1929 and has been practicing law in Baltimore ever since. Early in 1952 he was retained to represent one Georgios Kostatos in a deportation proceeding (R. 31). Kostatos, a Greek seaman charged with

remaining in Baltimore when his ship sailed, was being held for deportation. His defense, and the one asserted on his behalf by petitioner, was that he was in reality an American citizen. He contended that he was born in Pennsylvania but was taken as a child to Greece, where he spent most of his adult life. As an American citizen, he claimed that he was not liable to deportation.

In the course of the deportation proceedings, three separate hearings were held by officials of the Immigration and Naturalization Service. Two of these hearings were in Baltimore, on February 11, 1952, and June 16, 1952, and one was in Philadelphia, beginning on April 24, 1952. During the course of these hearings, sworn testimony was given and affidavits received.

As a result of these hearings two indictments were returned by the grand jury for the Eastern District of Pennsylvania on August 31, 1954. The first, No. 17,934, was in two counts and charged the petitioner and five others with conspiracy "to make false, fictitious and fraudulent statements to an agency of the United States, ... the Immigration and Naturalization Service" and with conspiracy "to defraud the United States and an agency thereof, to wit: the Immigration and Naturalization Service," all in violation of 18 U.S.C. 371 (R. 10-13). The second indictment, No. 17,946, charged the petitioner in three counts with subornation of perjury growing out of the Philadelphia hearings.

Two of the co-conspirators in the first, or conspiracy, indictment were "Georgios Kostatos, also known as George Modestos Kostatos" and "Louis Sitaras, of

Baltimore" (R. 10).* Two of the overt acts charged in identical language in each count were.

> "*Overt Act No. 6.* On or about February 14, 1952, Georgios Kostatos, also known as George Modestos Kostatos did make a certain sworn statement at Baltimore, Maryland.
>
> "*Overt Act No. 7.* On or about June 16, 1952, at Baltimore, Maryland, Louis Sitaras, of Baltimore, Maryland, did make a certain sworn statement." (R. 11, 13)

On January 19, 1955, petitioner pleaded not guilty to the charge of subornation of perjury (R. 24); petitioner and all co-conspirators except Georgios Kostatos pleaded not guilty to the conspiracy indictment (R. 26). On February 16, 1955, Georgios Kostatos pleaded guilty to the conspiracy charge and three of the other co-conspirators changed their pleas to guilty (R. 26). The fifth entered a guilty plea on September 19, 1955 (R. 27), leaving petitioner as the only defendant who still maintained his innocence.

Petitioner waived trial by jury and proceeded to trial on September 19, 1955. At this stage, the government dismissed the second count of the conspiracy indictment (R. 27), the one charging conspiracy to defraud, and elected to proceed solely on the first count, which charged a conspiracy to submit false statements (R. 10). Trial on this and the subornation of perjury charge consumed four days

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* In the course of events which led to the indictments in question, there were two people involved named Louis Sitaras. The Courts below generally referred to them as "Louis Sitaras of Baltimore" and "Louis Sitaras of Marcus Hook." Only the actions of Louis Sitaras of Baltimore are of concern at this stage and, unless otherwise indicated, references herein are to him.

and petitioner's co-conspirators became witnesses for the government (R. 20). At the conclusion of the trial, petitioner was permitted to withdraw his plea of not guilty and enter a plea of *nolo contendere* to the first count of the conspiracy indictment (R. 27). All other charges against the petitioner were dismissed (R. 24, 28). The Assistant United States Attorney stated for the record that "the government believed that the penalty provided by that count and under that act, conspiracy to submit false statements, was adequate and formed a sufficient basis for the Court to impose a sentence commensurate with the offenses charged." (R. 21).

On November 10, 1955, all other co-conspirators were allowed to withdraw their guilty pleas to the second count of the conspiracy indictment and that count was dismissed as to them also (R. 28). Four of the co-conspirators were fined and placed on probation, a fifth received a two month sentence and petitioner was sentenced to two months imprisonment (which was served immediately) and a $500 fine. All sentences were under the first count of the conspiracy indictment (R. 28).

Ten months later, on August 21, 1956, the grand jury for the District of Maryland indicted petitioner on two counts of subornation arising from the Baltimore hearings in the deportation case (R. 1). The first count charged that he had suborned Georgios Kostatos to testify falsely in Baltimore on February 14, 1952, and the second that he had suborned Eleftherios Sitaras (Louis Sitaras of Baltimore) to testify falsely in Baltimore on June 16, 1952. Over petitioner's objection that this served to place him twice in jeopardy for the same offense, the District Court

denied a motion to dismiss the indictment on January 17, 1957 (R. 5). Petitioner pleaded not guilty but was convicted and sentenced to imprisonment for six months. His conviction was affirmed by the Court of Appeals on January 5, 1959 (R. 327).

SUMMARY OF ARGUMENT

Petitioner has, in substance, been twice tried, twice convicted and now faces a second prison term for what is essentially the same offense. The Courts below attempted to justify the second trial and the imposition of a second sentence on the theory of *Pinkerton* v. *United States*, 328 U.S. 640, and *Pereira* v. *United States*, 347 U.S. 1, that a conspiracy to commit an offense and the substantive offense committed in furtherance of the conspiracy are "separate and distinct crimes" for which dual punishment may be imposed. Petitioner's case falls squarely within one of the recognized exceptions to the doctrine laid down by *Pinkerton* and *Pereira*, for here concert of action and the concurrence of two or more persons is the core of the substantive offense, see *Gebardi* v. *United States*, 287 U.S. 112, just as it is the core of the conspiracy, thus rendering the two usually separable offenses identical and not subject to dual prosecutions.

Moreover, even if the conspiracy and the substantive offense were held to constitute distinct offenses on the theory that each requires proof of some element not required by the other, petitioner's constitutional rights were violated when he was subjected to successive trials on account of a single course of conduct. The rule laid down in *Pinkerton* and *Pereira* applies only to prosecution for conspiracy and the substantive offense in a single trial. *Abbate* v. *United States*, 359 U.S. 187, statement of Justice Brennan.

ARGUMENT

I. Conspiracy to Commit Perjury and Subornation of Perjury Constitute a Single Offense.

The essential identity of the two crimes for which petitioner has been tried and convicted necessarily requires application of the constitutional protection against double jeopardy. In the first case the government charged that he conspired with Georgios Kostatos, Louis Sitaras, and three others to make false statements to immigration authorities, and that in furtherance of the conspiratorial objective Kostatos, Sitaras, and the three others did in fact make false sworn statements to immigration authorities. In the second case the government charged that petitioner suborned Kostatos and Sitaras to make false sworn statements to immigration authorities. Precisely the same statements are involved in both cases. Under these circumstances, if petitioner is guilty of the conspiracy he must be guilty of the subornation; and if he is not guilty of the conspiracy he cannot be guilty of the subornation. The two offenses are in contemplation of law a single crime for which petitioner can be punished only once.

The government, in its Memorandum filed in this Court in response to the petition for certiorari, stated:

> ". . . the precise issue here—the relationship of the crimes of subornation of perjury and of conspiracy to submit false statements—is one that has not previously come before the Court."

Petitioner entirely agrees that the narrow issue here presented has not previously come before this Court. There is no concern about dual sovereignty, as in *Abbate* v. *United States*, *supra*, and *Bartkus* v. *Illinois*,

359 U.S. 121. Nor is there a broad scale attack upon the principle of *Pereira* v. *United States*, *supra*, and *Pinkerton* v. *United States*, *supra*, that the commission of a conspiracy and the substantive offense may both, in most instances, be prosecuted. Finally, there is no apparent congressional intent in this case to make separate criminal offenses from a single criminal act. *Gore* v. *United States*, 357 U.S. 386. See, generally, Kirchheimer, The Act, The Offense and Double Jeopardy, 58 Yale Law Journal 513.

Petitioner has no quarrel with the general principle that, in most instances, a defendant may properly be convicted both for conspiracy and for the substantive offense which is the object of the conspiracy. As stated by this Court in *Pereira*, 347 U.S. at 11:

> "It is settled law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both. See *Pinkerton* v. *United States*, 328 U.S. 640, 643-644, and cases cited therein. Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy."

That this general rule is not without qualification, however, was recognized in *Sealfon* v. *United States*, 332 U.S. 575, at 578, where this Court said:

> "It has long been recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. *Pinkerton* v. *United States*, 328 U.S. 640, 643. Thus, *with some exceptions*, one may be prosecuted for both crimes." (Emphasis added.)

The rule set forth in *Pereira*, *supra*, that punishment may properly be imposed for both the conspiracy

and the substantive offense, is subject to at least one well recognized exception. There are certain classes of crimes in which such duplication of offenses and punishments is never permitted. When the agreement and interaction of two or more persons is necessary for the completion of the substantive offense or when the substantive offense requires the same community of purpose as would a conspiracy to commit the offense, it is not proper to indict and convict for both the conspiracy and the substantive offense. Typical illustrations of this type of offense, acknowledged not only by state and lower federal courts, but by this Court as well, are adultery and fornication, *State* v. *Law*, 189 Iowa 910, 179 N.W. 145, *Shannon and Nugent* v. *Commonwealth*, 14 Pa.St. 226; bribery, *United States* v. *Dietrich*, 126 Fed. 664, *United States* v. *Sagar*, 49 F.2d 725, *People* v. *Wettengel*, 98 Colo. 193; 58 P.2d 279; unlawful rebates, *United States* v. *New York Cent. & H.R.R. Co.*, 146 Fed. 298. Bigamy and dueling are two other similar offenses in which this doctrine has been recognized by this Court. See *United States* v. *Holte*, 236 U.S. 140, at 145.

These are crimes in which the actual concurrence of two persons is absolutely necessary to the commission of the substantive offense. The cases all have one common denominator. A joint agreement is at the core of each of these substantive offenses. There must be, in each, a concert of action between the principal actors—the adulterers, the bigamists, the duelists, the briber and the bribed. See also *Gebardi* v. *United States*, *supra*; *United States* v. *Katz*, 271 U.S. 354; *State* v. *McLaughlin*, 132 Conn. 325, 44 A.2d 116; *People* v. *Purcell*, 304 Ill.App. 215, 26 N.E.2d 153; 2 Wharton, Crim. Law § 1339.

So, too, with subornation of perjury. This is another offense which falls within the class of cases where, since a concert of action must be present, two separate crimes cannot properly be constructed from the single act. There can be no subornation of perjury without a perjurer, *Hammer* v. *United States*, 271 U.S. 620, and a suborner. The actual cooperation and interaction between the two must always be present, just as in cases of adultery, bribery and dueling.

It is important to realize that petitioner's case is not a situation in which two or more persons conspire to suborn certain others. An indictment charging both conspiracy and subornation might be constitutionally permissible under these circumstances. *Williamson* v. *United States*, 207 U.S. 425. Petitioner's Maryland indictment, however, charges him with suborning Kostatos and Sitaras, two of his co-conspirators in the Philadelphia indictment, thus bringing his case squarely within the exception to the rule which permits separate punishment for conspiracy and the substantive offense.

Against this background, the indictment and trial in Philadelphia take on a wholly new context and can more properly be assessed. By the very nature of the crime involved, petitioner could not properly be convicted for conspiring with Kostatos and Sitaras to have them submit false testimony and also for suborning them to give the same false testimony charged in the conspiracy indictment. Yet that is the effect of the dual charges against petitioner. He was charged and convicted in Philadelphia with being part of a conspiracy. The object of that conspiracy was to submit false information under oath to an

agency of the United States. The acts of two of the co-conspirators were perjury committed at a deportation hearing—the same perjury which petitioner was subsequently convicted of suborning.

A mere reading of the two Philadelphia indictments reveals the government's concept of who the principal actor was. Count 1 of the Philadelphia conspiracy indictment involves petitioner, specifically or by fair inference, in five of the eight overt acts—all having to do with offering false affidavits or testimony of his co-conspirators. Count 2 of the same indictment adds an additional act—the attempt by petitioner to procure a false baptismal certificate. In addition, petitioner was charged with three counts of suborning perjury in Philadelphia. There was thus a clear attempt to label him as the focal point of the conspiracy, the attorney who arranged false records and suborned witnesses on behalf of a client.

It is basic that the act of one conspirator, committed in furtherance of the conspiratorial objective, is in law and in fact the act of each other co-conspirator. *United States* v. *Sansone*, 231 F.2d 887, certiorari denied, 351 U.S. 987; see *Braverman* v. *United States*, 317 U.S. 49. Petitioner was thus clearly implicated in all of the acts charged in the indictment, particularly in those shown as Overt Acts 6 and 7, the ones which, in effect, charge that Kostatos and Sitaras committed perjury at the Baltimore hearings of February 14 and June 16, 1952. This is all the more apparent since petitioner represented Kostatos at the Baltimore hearings, just as he had done at the Philadelphia hearing. Petitioner's involvement becomes even clearer in view of the fact that both perjurers, Kostatos and Sitaras, together with the other

Philadelphia conspirators, pleaded guilty to the Philadelphia indictment, thereby admitting all the factual recitals contained therein. *Lindsay v. United States*, 134 F.2d 960, certiorari denied, 319 U.S. 763; *Kahl v. United States*, 204 F.2d 864. Not only did they all plead guilty but, at petitioner's Philadelphia trial, they all gave evidence against him, laying at his feet the root of the conspiracy and the false evidence presented in furtherance thereof. The Assistant United States Attorney commented upon the "whole-hearted cooperation" of certain of petitioner's co-defendants (R. 20) and the light sentences imposed upon all except the alien Kostatos (R. 28) are indicative of the course the trial took.

Petitioner was, therefore, fully implicated in the Baltimore perjury by the Philadelphia indictment and the ensuing events. This was at least impliedly recognized by the United States Attorney. After agreeing to petitioner's *nolo contendere* plea, he moved to dismiss the Philadelphia subornation charge and stated (R. 23):

> "It is believed that the aforesaid conspiracy charge is an adequate basis upon which the court can impose a substantial sentence."

The government was thus asking the court to recognize petitioner's serious misconduct and impose an appropriate penalty. It cannot now ask the courts to impose another penalty for essentially the same misconduct.

II. The Fifth Amendment Prohibits Successive Federal Prosecutions Based Upon the Same Acts.

Ten days after the petition for certiorari was filed herein, this Court decided the case of *Abbate v. United States, supra*. In an opinion by Justice Brennan, the

majority held that successive state-federal prosecutions on account of the same criminal conduct did not violate the double jeopardy clause of the Fifth Amendment. Justice Brennan also filed a separate opinion which is squarely applicable to the facts of this case.

In *Abbate* the government had urged as an alternate ground for decision that the two statutes under which petitioner had been prosecuted were designed to vindicate different governmental interests and required different evidence to support conviction. Although the majority found it unnecessary to pass upon this proposition, Justice Brennan considered its implications to be so disturbing as to require comment." He pointed out that the government's reasoning "would apply equally if each of two successive *federal* prosecutions based on the same acts was brought under a different *federal* statute, and each statute was designed to protect a different federal interest." He went on to conclude, 359 U.S. at 197:

> "However, whatever the case under the Fourteenth Amendment as to successive state prosecutions, *Hoag* v. *New Jersey*, *supra*, or under the Fifth Amendment as to consecutive federal sentences imposed upon one trial, *e.g.*, *Gore* v. *United States*, *supra*, I think it clear that successive federal prosecutions of the same person based on the same acts are prohibited by the Fifth Amendment even though brought under federal statutes requiring different evidence and protecting different federal interests."

All of the cases permitting multiple punishment for a single course of conduct involve cumulative sentences imposed after a single prosecution. As pointed out by Justice Brennan, the basis of the double jeopardy clause is that a person shall not be harassed

by successive trials. It is, in essence, a prohibition not against being twice punished, but against being twice put *in jeopardy*. Obviously successive prosecutions offer far more danger of harassment than cumulative punishments. While the prosecutor may charge multiple offenses in a single prosecution, the court always has discretion as to the imposition of cumulative sentences.

The present case illustrates possibilities of harassment going far beyond anything suggested by *Abbate*. Petitioner pleaded *nolo contendere* to one count of the conspiracy indictment, with the obvious understanding that all other pending charges against him would be dismissed. All such charges were in fact dismissed (R. 23, 27). Petitioner received a comparatively "light" sentence and the record shows that he was not disbarred (R. 28, 241). After this sentence was served and petitioner returned to the practice of his profession, new charges were brought against him in Maryland. These charges resulted in a conviction and a sentence three times as severe as the original sentence. While the record contains no information concerning subsequent disbarment proceedings, this Court can take judicial notice of the fact that a verdict of guilty might have very different consequences from a plea of *nolo contendere* insofar as disbarment is concerned.

The foregoing facts strongly suggest that the United States Attorney in Maryland was not satisfied with the penalty imposed upon petitioner by the District Court in Pennsylvania. They strongly suggest that the prosecution was "shopping" for a sentence which it considered more commensurate with petitioner's conduct. This is precisely the sort of harassment

which the double jeopardy clause was designed to prevent. Nice distinctions about different evidence and different statutes cannot obscure the fundamental unfairness of successive prosecutions for a single course of conduct. The principles enunciated by Justice Brennan in *Abbati* compel reversal in this case.

CONCLUSION

For the foregoing reasons, petitioner urges that the judgment of the court below should be reversed and the case remanded with directions to vacate the conviction and dismiss the indictment.

EDWARD BENNETT WILLIAMS
RAYMOND W. BERGAN
AGNES A. NEILL
1000 Hill Building
Washington 6, D. C.
Counsel for Petitioner

October 1959.